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April 23.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir George Knox, Mr. Justice Banerji, Mr. Justice Aikman and Mr. Justice Richards.

EMPEROR *v.* TULA KHAN.*

Criminal Procedure Code, sections 123 *and* 397—*Act No. IX of* 1894 *(Prisons Act), section* 3(3)—*Security for good behaviour—Imprisonment on failure to find security—"Sentence."*

Held that where a person is ordered by a Magistrate to be "detained in prison" pending the orders of the Sessions Judge under section 123 of the Code of Criminal Procedure such person must be considered as a person undergoing a sentence of imprisonment and not merely as an under-trial prisoner detained in custody.

Held also that an order for imprisonment on failure to furnish security for good behaviour is a "sentence" within the meaning of section 397 of the Code of Criminal Procedure. *Queen-Empress* v. *Diwan Chand* (1) referred to.

THIS was a reference made by the Sessions Judge of Farrukhabad under the circumstances set forth in the following order:—

"On November 14th, 1907, one Tula Khan was ordered by M. Abdul Jalil, a Magistrate of the first class, to furnish security for good behaviour for the term of three years. The order was not quite in accordance with the procedure laid down in section 123 of the Code of Criminal Procedure, for, while it contained a direction that the case should be submitted to this Court for orders, it also contained an illegal direction that in default of furnishing security the accused should be rigorously imprisoned for three years.

"On November 27th Tula Khan was convicted by M. Mata Badal, a Magistrate of the first class, of an offence under section 332 of the Indian Penal Code and sentenced to two years' rigorous imprisonment, including three months' solitary confinement, and it was ordered that this sentence should take effect at once and that "the sentence which the prisoner is undergoing now" should be carried out after and in addition to the sentence under section 332 of the Indian Penal Code.

* Criminal Reference No. 81 of 1908 made by W. H. Webb, Sessions Judge of Farrukhabad, dated the 20th January 1908, against an order of Abdul Jalil, Magistrate first class of Farrukhabad, dated the 14th of November 1907.

(1) Punjab Rec., 1895, Cr. J., p. 5.

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"This order was doubly improper, for in the first place Tula Khan was not undergoing any legal 'sentence' of imprisonment at the time, but was merely being detained in prison pending the orders of this Court under section 123 of the Code of Criminal Procedure, and in the second place M. Mata Badal had no jurisdiction whatever to determine the date from which the so-called sentence should take effect. All that he could do was to direct that the sentence under section 332 of the Indian Penal Code should take effect at once, unless the accused were already undergoing a sentence of imprisonment, in which case the sentence under section 332 of the Indian Penal Code must necessarily (*vide* section 397 of the Code of Criminal Procedure) commence at the expiration of the imprisonment to which the accused had been previously sentenced.

"On December 7th, 1907, this Court approved the order of M. Abdul Jalil directing the accused to furnish security for a period of three years, and ordered that in the event of his failing to furnish the required security he should be rigorously imprisoned for three years with effect from the date of the Magistrate's order. This Court was unaware of the fact that the accused had meanwhile been sentenced to a term of imprisonment under section 332 of the Indian Penal Code. Had it been aware of that fact, this Court, in exercise of the wide powers conferred by section 123 (3) of the Code of Criminal Procedure and in view of the powers conferred on the Magistrate by section 120 (2) of the Code of Criminal Procedure, would have directed that the period for which security was to be given should commence on the expiration of the sentence under section 332 of the Indian Penal Code.

"I now submit the records of both cases to the Hon'ble High Court with the recommendation that the order of M. Abdul Jalil directing Tula Khan to be rigorously imprisoned for three years in default of furnishing security, and the order of M. Mata Badal in regard to the execution of that illegal sentence be set aside as *ultra vires* and of no effect, and that the order of this Court be so modified as to require Tula Khan to furnish security for three years with effect from the expiration of his sentence under section 332 of the Indian Penal Code,

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and in default to be rigorously imprisoned for three years."

The reference was by order of the Chief Justice laid before a Full Bench of the Court for disposal.

The Government Advocate (Mr. *A. E Ryves*), for the Crown.

In this case two questions arise—(1) whether the words "detained in prison" in sub-section (2) of section 123 of the Code of Criminal Procedure are equivalent to imprisonment in jail or to detention in custody, and (2) if the former, *i.e.*, imprisonment, do the provisions of section 397 of the Code apply to the case of a person imprisoned in default of furnishing security who is subsequently convicted and sentenced to imprisonment for an offence?

The words "detained in prison" occur twice in section 123. They must mean the same thing in each instance. In sub-section (1) the words must be taken to be equivalent to "imprisonment," otherwise sub-sections (5) and (6) can have no meaning. Consequently in sub-section (2) the warrant which the Magistrate is bound to issue that a person on failure to give security be detained in prison pending the orders of the higher tribunal to which the records must be submitted must be a warrant of imprisonment, either rigorous or simple as the Magistrate sees fit. See also the definition of "convicted criminal prisoner" in section 3 (3) of Act No. IX of 1894 and section 27 of the same Act as to the difference drawn between a convicted prisoner and an under-trial prisoner. Throughout Chapter VIII of the Code of Criminal Procedure where detention in hawalat is indicated the word used is "custody"—*vide* section 107, for example.

The whole of the proceedings under section 123 (2) are more analogous to what happens when a Court of Session condemns an accused to death and submits the record for confirmation of the sentence to the High Court than to the case of a Magistrate committing an accused person for trial to the Court of Session.

There is no reason why a Magistrate, who must be either a District Magistrate, Presidency Magistrate, or Magistrate of the first class specially empowered by the Local Government, who

after a regular trial comes to the conclusion that if security is not forthcoming the person from whom it has been demanded should be imprisoned, should not be able to send that person at once to jail, if he thinks a period of imprisonment exceeding one year is necessary, seeing that he has full power to order imprisonment up to one year.

The cases of *Queen-Empress* v. *Jafar* (1) and *Emperor* v. *Jawahir* (2) do not touch the question. They only decide that the Magistrate under the second clause of section 123 cannot order imprisonment for three years.

The proviso to sub-section (3) indicates that any period of imprisonment already undergone in obedience to the Magistrate's *ad interim* order shall be taken into account by the Court of Session, so that in no event can the term exceed three years.

If then "detained in prison" in sub-section (2) is equivalent to imprisonment, it seems to follow that a person so detained is undergoing a sentence of imprisonment within the meaning of section 397. It is submitted that the case in the Punjab Record for 1895 (*Diwan Chand*) was wrongly decided.

Section 120 does not help. The opening words of that section have apparently been overlooked by the Punjab Court. Section 120 only applies to persons sentenced to or undergoing imprisonment at the time when an order under section 106 or section 118 is passed and does not refer to the stage reached by section 123.

Besides, this ruling reads into section 397, words which are not there. In section 397 the words "sentence of imprisonment" alone are used, not "sentence for an offence" or "on conviction for an offence." Compare sections 400 and 398. Section 400 clearly would apply to a person undergoing imprisonment in default of security.

If section 397 does not apply, then a person undergoing rigorous imprisonment for default in furnishing security could with impunity commit other offences.

STANLEY, C. J.—This case raises the question whether a person required to execute a bond with sureties for his good behaviour under section 110 of the Code of Criminal Procedure

(1) Weekly Notes, 1899, p. 151. (2) Weekly Notes, 1903, p. 28.

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and the succeeding sections for a period exceeding one year must, pending the orders of the Sessions Judge or High Court, as the case may be, under section 123, be regarded as a prisoner convicted of an offence and imprisoned accordingly, or be merely detained in custody as an under-trial prisoner.

Tula Khan was on the 14th of November 1907 ordered under section 118 of the Code of Criminal Procedure to give security for his good behaviour for a period of three years, and in default of his doing so was ordered to undergo rigorous imprisonment for that period. Later on, namely, on the 27th of November 1907 he was convicted of an offence punishable under section 332 of the Indian Penal Code and sentenced therefor to two years' rigorous imprisonment to take effect forthwith. The order of the Magistrate of the 14th of November 1907 was maintained by the Sessions Judge on the 7th of December 1907.

Two questions then arise.

The first is whether in the interval between the 14th of November 1907, the date of the Magistrate's order, and the 7th of December 1907, the date of the order of the Sessions Judge, Tula Khan was to be regarded as a prisoner undergoing a sentence of imprisonment or merely an under-trial prisoner detained in custody.

The second is whether under the circumstances the sentence of imprisonment passed upon him for the offence punishable under section 332 is to commence at the expiration of the imprisonment ordered by the Magistrate and maintained by the Sessions Judge.

Owing to the looseness of the language used in the sections of the Code dealing with this matter, the question is not free from difficulty. Section 123 (1) provides that if any person ordered to give security under section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case mentioned in sub-section (2) of the section, be *committed to prison*, or if he is already in prison, be *detained in prison* until such period expires, or until within such period he gives the security to the Court or Magistrate who made the order requiring it. Sub-section (2)

provides that when such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or High Court as the case may be. Then sub-section (3) provides that the Court, that is, the Sessions Judge or High Court, as the case may be, after examining the proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, shall pass such orders in the case as it thinks fit.

I have no doubt that the words "committed to prison" in sub-section (1) are equivalent to a sentence of imprisonment and do not merely mean "committed to custody." In the succeeding portion of the section the words "if he is already in prison" give an indication of the meaning of the words "committed to prison." They imply that the party is undergoing imprisonment, and the succeeding words "be detained in prison" seem necessarily to mean that the imprisonment which the party is already undergoing shall be continued. This meaning derives support from sub-section (6), which provides that imprisonment for failure to give security for good behaviour may be rigorous or simple. This sub-section gives us an insight into the mind of the Legislature and indicates the meaning attributed by it to the words "committed to prison" or "detained in prison." In section 3 (3) of Act No. IX of 1894 (the Prisons Act), which gives a definition of convicted criminal prisoners, we find that a person ordered to give security for good behaviour under the bad livelihood sections of the Code is included in the term. This is an Act in *pari materiâ*, and may be looked to in determining the language of the sections with which we are dealing.

Then we come to sub-section (2), in which fall the words which we are called upon to interpret. It provides for the case in which a person has been ordered by the Magistrate to give security for a period exceeding one year, and directs the Magistrate, if such person does not give the security, to "issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge . . . ." Are the words "detained in prison" equivalent to imprisonment, or do they merely mean

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"detained in custody" as an under-trial prisoner? As used in sub-section (1) they must, as I have attempted to show, be regarded as equivalent to imprisonment, and there seems to be no good reason why they should not have a similar meaning in this sub-section. It would be contrary to the principles of interpretation to assign a different meaning to the same words when used in an Act of the Legislature, and particularly so when they occur, as here, in the same section. In view then of the language of the section, I think that the Legislature intended that a person failing to give security for his good behaviour should be liable to imprisonment, either simple or rigorous, and that in a case to which sub-section (2) applies such imprisonment should have effect, pending the orders of the Sessions Judge, from the date on which the warrant of the Magistrate directing detention in prison has been executed.

I now come to the second question, that is, whether Tula Khan was undergoing a sentence of imprisonment within the meaning of section 397 of the Code when the sentence was passed upon him for the offence punishable under section 332. In other words, whether the last mentioned sentence is to be treated as commencing at the expiration of the imprisonment ordered by the Sessions Judge. It seems to me to follow as a corollary to the answer which I would give to the first question that section 397 is applicable. The order of the Sessions Judge cannot be regarded otherwise than as amounting to a sentence of imprisonment, if the words "committed to prison" or "detained in prison" mean imprisonment. I would therefore answer this question in the affirmative.

KNOX, J.—I have had the advantage of reading and considering the judgment of the learned Chief Justice. I need say no more than that I concur.

BANERJI, J.—Two questions arise in this case.

(1) When a person has been ordered by a Magistrate to give security for his good behaviour for a period exceeding one year and that person does not give such security, is the Magistrate competent to issue a warrant for his imprisonment simple or rigorous? and

(2) Is an order of imprisonment for failure to give security for good behaviour a sentence within the meaning of section 397 of the Code of Criminal Procedure ?

As regards the first question it is obvious that the Magistrate has no authority in a case to which sub-section (2) of section 123 of the Code of Criminal Procedure applies to order the person who has failed to give security to be imprisoned for three years or any other specific period. He is only competent under that sub-section to issue a warrant directing such person "to be detained in prison" pending the orders of the Sessions Judge or the High Court as the case may be. The order of the Magistrate in this case directing Tula Khan to be rigorously imprisoned for three years is therefore clearly illegal. The question is whether the Magistrate was competent to order Tula Khan to be kept in simple or rigorous imprisonment pending the orders of the Sessions Judge, or whether he could only direct Tula Khan to be detained in custody as an under-trial prisoner pending such orders. The answer to this question depends on the meaning to be attributed to the words "detained in prison" in that sub-section. Do those words mean imprisonment, or simply detention in custody ? The matter is not free from difficulty, and I must confess that I was at first inclined to hold that the Legislature intended the detention to be detention in custody only, as the Magistrate is not the authority which has to make the final order for imprisonment in the case, and that order must emanate from the Court of the Sessions Judge. No doubt could have arisen in the matter had the Legislature employed the same language in sub-section (2) as it has used in sub-section (1), and had sub-section (2) provided that the Magistrate should issue a warrant directing the person who has failed to give security to be committed to prison, or if he is already in prison to be "detained in prison" pending the orders of the Sessions Judge. However, we have the fact that the same words, namely, "detained in prison" are used in both the sub-sections. There can be no doubt that in sub-section (1) those words mean imprisonment, which may under sub-section (6) be either rigorous or simple. When the Legislature uses the same words in another clause of the same section we must presume that it does so in the same

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sense, and therefore "detention in prison" in sub-section (2) must be held to mean imprisonment, as in the first sub-section. This construction may in some instances result in hardship: for instance, where a person ordered by the Magistrate to furnish security for good behaviour for a period of three years is found by the Sessions Judge to be a person who should not have been ordered to give security, he will have suffered imprisonment before the final order in the case was made. This, however, may happen in many cases of conviction by a subordinate Court. That the Legislature intended the words "detained in prison" to mean imprisonment and not mere detention in custody also appears from the fact that in section 107 it uses the words "detain in custody," and this conclusion finds some support from the definition of a "convicted criminal prisoner" in the Prisons Act (No. IX of 1894). I must therefore hold that when a person ordered by a Magistrate to give security for good behaviour for a period exceeding one year does not give such security the Magistrate is not competent to order such person to be imprisoned for the period for which he has been ordered to give security, but should issue a warrant directing him to be detained in simple or rigorous imprisonment, as the Magistrate may determine, pending the orders of the Sessions Judge or the High Court as the case may be. I may observe that this question was neither raised nor decided in *Queen-Empress* v. *Jafar* (1) and *Emperor* v. *Jawahir* (2), which are the only cases bearing on the point to which our attention was invited.

Upon the second question, namely, whether an order of imprisonment in default of giving security for good behaviour is a sentence within the meaning of section 397, I entertain some doubts. A sentence of imprisonment, ordinarily implies punishment for an offence committed, and therefore imprisonment for failure to furnish security cannot be regarded as a sentence in the ordinary sense of that word. There is much force in the reasoning by which the judgment of the Punjab Chief Court in the case of *Queen-Empress* v. *Diwan Chand* (3) is supported. It seems, however, that the Legislature used the word "sentence"

(1) Weekly Notes, 1899, p. 151. (2) Weekly Notes, 1903, p. 23.
(3) Punjab Rec., 1895, Cr. J., p. 45.

in section 397 in a wide sense. If it were held that the word did not include imprisonment in default of furnishing security, a person undergoing such imprisonment may practically escape punishment for an offence of which he may be subsequently convicted. Section 120 of the Code of Criminal Procedure cannot apply to such a case, and surely it could never have been intended that he should go unpunished. I would therefore answer the second question in the affirmative.

AIKMAN, J.—A Magistrate of the first class ordered one Tula Khan to give security for his good behaviour for a period exceeding one year. The security not having been given, the Magistrate, under the provisions of section 123 (2) of the Code of Criminal Procedure, forwarded the case to the Sessions Judge for orders. In the earlier part of his order the Magistrate directed that in default of furnishing security Tula Khan should undergo rigorous imprisonment for three years. This part of the Magistrate's order was clearly wrong. At the conclusion of his order, however, he directs that pending the order of the Sessions Judge, the accused should undergo imprisonment.

The Magistrate's order was passed on the 14th November 1907.

On the 7th December 1907 the learned Sessions Judge, being satisfied "that the accused is an habitual thief and extortioner and that he is so desperate and dangerous as to render his living at large hazardous to the community," directed that in the event of his failing to furnish the security he be rigorously imprisoned for the term of three years with effect from the date of the Magistrate's order.

In the interval between the date of the Magistrate's order and the date of the Sessions Judge's order Tula Khan was convicted, on the 27th November 1907, by another Magistrate of an offence punishable under section 332 of the Indian Penal Code, and was sentenced to two years' rigorous imprisonment. The Magistrate directed that this sentence should take effect at once and that the accused should subsequently undergo the imprisonment consequent on his failure to furnish security. No appeal, we are informed, has been preferred by the accused against this conviction and sentence.

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The learned Sessions Judge has submitted the case to this Court with the recommendation—1st, that that portion of the order of the Magistrate, dated 14th November 1907, which directs Tula Khan to be rigorously imprisoned for three years in default of furnishing security should be set aside; 2nd that the order of the Magistrate, dated 27th November 1907, in regard to the execution of the sentence under section 332 of the Indian Penal Code, should also be set aside; and 3rd, that his own order of the 7th December 1907 directing the period of imprisonment in default of furnishing security to run from the 14th November 1907 should be modified, and that it should be directed that the period for which Tula Khan is to furnish security and the imprisonment in default should run from the expiration of the sentence under section 332, Indian Penal Code.

With regard to the first recommendation I think it is only necessary to point out the mistake the Magistrate made in his order of 14th November 1907 as the order of the Sessions Judge, dated the 7th December 1907 is now the operative order.

The second and third recommendations of the learned Judge raise a more difficult question. The answer to it depends upon the answer to the question whether Tula Khan when he was sentenced to imprisonment under section 332, Indian Penal Code, was "a person already undergoing a sentence of imprisonment" within the meaning of section 397 of the Code of Criminal Procedure so as to render the provisions of that section applicable.

I think this question must be answered in the affirmative. Section 123 (2) of the Code of Criminal Procedure directs that when a person ordered by a Magistrate to give security for a period exceeding one year fails to give the security required, the Magistrate shall "issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge." I think it cannot be denied that a person detained in prison under such a warrant is, during the period of his detention, undergoing "imprisonment for failure to give security."

The provisions of sub-sections (5) and (6) contain directions as to the nature of the imprisonment in such a case and clearly indicate that a person "detained in prison" under sub-section (2) is in a very different position from a person awaiting his trial

for an offence. The warrant issued in the latter case is a warrant committing him to "custody"—*vide* section 220 of the Code of Criminal Procedure.

The Prisons Act, 1894, draws a distinction between a "convicted criminal prisoner" and an "unconvicted criminal prisoner" and section 3 (3) of that Act declares that the expression "convicted criminal prisoner" includes a person detained in prison under Chapter VIII of the Code of Criminal Procedure, the chapter in which section 123 occurs. I think it is clear from the language both of the Code of Criminal Procedure and of the Prisons Act, 1894, that the Legislature considers that a person who is ordered to be "detained in prison" for failure to give security occupies a very different position from a person who is under trial. I hold that a Magistrate who under section 123 (2) orders a person who has failed to furnish security for his good behaviour to be detained in prison pending the orders of the Sessions Judge thereby sentences the person to imprisonment, which, under sub-section (6), may be rigorous or simple as the Magistrate directs. The proviso to section 123 (3) enacts that the period for which any person is imprisoned for failure to give security shall not exceed three years. In the present case the learned Sessions Judge therefore very properly ordered that the period of three years for which Tula Khan was to be imprisoned in the event of his failing to furnish security was to have effect, not from the date of his own order, but from the date of the Magistrate's order. I hold then that when Tula Khan was sentenced for the offence under section 332, Indian Penal Code, he was a person "already undergoing a sentence of imprisonment" within the meaning of section 397 of the Code of Criminal Procedure. It will be noted that in section 397 the words "for any offence" which we find in section 399 after the word "imprisonment" do not occur. If they did, it would be impossible to hold that section 397 applies to the present case. For the reasons given above I hold that section 397, Code of Criminal Procedure, applies to this case. I cannot therefore accept the learned Judge's second and third recommendations. I would allow the order of the learned Sessions Judge, dated 7th December 1907, to stand, but would modify the order of the Magistrate,

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dated 27th November 1907, by setting aside so much of it as directed that the sentence under section 332, Indian Penal Code, should take effect forthwith, and in lieu thereof direct that that sentence shall commence at the expiration of the imprisonment adjudged to him (Cf. Form XIV, Sch. V, Code of Criminal Procedure) owing to his failure to furnish security for his good behaviour.

RICHARDS, J.—The first question which arises is the meaning of the expression "detained in prison" in section 123, sub-section (2) of the Code of Criminal Procedure. In other words, should a Magistrate after he has ordered a person to give security under section 106 or section 118, and after that person has failed to give security, issue a warrant directing the person to be kept in rigorous or simple imprisonment pending the orders of the Sessions Judge, or should the warrant simply direct that that person should be kept in custody? The argument in favour of the latter construction is that the position of the person named in the warrant is analogous to the position of an "under-trial" prisoner; that the Magistrate has no power to order the person to be imprisoned because the final order must be made by the Sessions Judge, who may possibly discharge the accused altogether.

Clause (1) provides that on failure to give security in the case of a person ordered to give such security for a period not exceeding one year the Magistrate shall commit the person to prison, or if the person is already in prison shall detain him in prison.

Clause (5) provides that imprisonment for failure to give security for keeping the peace shall be simple.

Clause (6) provides that imprisonment for failure to give security for good behaviour may be rigorous or simple.

Section 3 (3) of Act IX of 1894 includes in the definition of "convicted criminal prisoner" any person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure.

Reading clauses (1), (5) and (6) of section 123 together, it is perfectly clear that a person who has been ordered to give security by a Magistrate for a period not exceeding one year,

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and who has failed to give such security, must be imprisoned with either simple or rigorous imprisonment.

Had clause (2), after the words "warrant directing him," read "to be committed to prison or to be detained in prison," that is to say, had the same mode of expression been adopted in clause (2) as in clause (1) there would be no difficulty. The change of expression, no doubt, creates some ambiguity. I, however, think that if the expression "detained in prison" in clause (1) means detained in simple or rigorous imprisonment, the same expression in clause (2) must have the same meaning. This view is strengthened by the definition of "convicted criminal prisoner" to which I have already referred, and also by a comparison with clauses (3) and (4) of section 107, where the expression "detaining such person in custody" and "detain such person in custody" are used. I do not think that the argument based on the supposed analogy of a person ordered to give security for a period exceeding one year with an under-trial prisoner is sound. A particular class of Magistrate is prescribed by the Code for holding the inquiry which must be held before an order under section 123 is passed: it is such a Magistrate who must always adjudicate whether or not the person is a person from whom security ought to be demanded. If security is only to be demanded for one year the Magistrate makes a complete order. It is only when the Magistrate has ordered the person to give security for a period exceeding one year, and the person has failed to give such security, that the proceedings are to be laid before the Sessions Judge. If the Legislature has given power to the Magistrate to send a person to rigorous or simple imprisonment whom he has found to be a person from whom security should be demanded for one year, I can see no reason why he should not have power to send a person to like imprisonment whom he has found to be a worse and more dangerous character. The imprisonment should of course be only as provided by section, that is, pending the orders of the Sessions Judge.

On the second question I agree with the judgment of the learned Chief Justice.

BY THE COURT.—The order of the Court is that the order of M. Abdul Jalil, dated 14th November 1907, in so far as it directs

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Tula Khan to be rigorously imprisoned for three years be set aside; that the said order be altered into one directing the detention of Tula Khan in rigorous imprisonment pending the orders of the Sessions Judge; that the order of the Sessions Judge dated 7th December 1907 be affirmed, and that the order of M. Mata Badal dated 27th November 1907 be modified to this extent that the sentence passed by him on Tula Khan under section 332 of the Indian Penal Code do take effect from the date of the expiration of Tula Khan's imprisonment for failure to give security for his good behaviour.

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April 27.

APPELLATE CIVIL.

Before Mr. Justice Aikman and Mr. Justice Griffin.

HANWANT SINGH AND OTHERS (APPLICANTS) *v.* RAM GOPAL SINGH AND OTHERS (OPPOSITE PARTIES) *

Civil Procedure Code, sections 367, 588 (18)—*Dispute as to who is the legal representative of a deceased appellant—Appeal.*

Held on a construction of section 367 of the Code of Civil Procedure that a dispute as to who is the legal representative of a deceased appellant is not confined to the case of rival claimants to represent the deceased. *Subbayya* v. *Saminadayyar* (1) followed.

THE facts of this case are as follows:—

One Dunia Singh brought a suit against Ram Gopal Singh and others for redemption of a mortgage. The suit was dismissed by the Court of first instance. Dunia Singh filed an appeal against the decree of the first Court, but died after filing the appeal. Within the time allowed by law, Hanwant Singh and others, who were admittedly the sons of Dunia Singh's first cousin, applied to be brought on the record as appellants in place of the deceased Dunia Singh. The mortgagees defendants disputed their right to be brought on the record, on the ground that, being of illegitimate birth, they were not the legal representatives of the deceased. A considerable number of witnesses were examined, and in the result the District Judge held that the applicants had been unable to successfully rebut the evidence adduced by the other side. He consequently

* First Appeal No. 62 of 1907 from an order of G. A. Paterson, District Judge of Benares, dated the 6th of April 1907.

(1) (1895) I. L. R., 18 Mad., 496.